



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Pasco Realty

**File:** B-245705

**Date:** January 8, 1992

Evie Hosking for the protester,  
Wayne N. Martin for Wayne Martin and Associates Realty,  
Inc., an interested party.  
Kenneth C. Robertson, Department of Agriculture, for the  
agency.  
C. Douglas McArthur, Esq., and Michael R. Golden, Esq.,  
Office of the General Counsel, GAO, participated in the  
preparation of the decision.

### DIGEST

Competition was not conducted on a common basis and the resulting award was improper where solicitation language provided that firms offering brokerage services at a rate less than that prevailing in the area must provide evidence of having sold property at the discounted rate during the previous year, and where agency continued to adhere to this requirement when requesting best and final offers but ultimately accepted an offer at a discounted rate submitted without such evidence.

### DECISION

Pasco Realty protests the award of a contract under request for proposals (RFP) No. 28-00-1-84, issued by the U.S. Department of Agriculture for real estate brokerage services. The protester argues that the agency improperly accepted an offer from Wayne Martin and Associates Realty, Inc., to provide brokerage services at a 4.5-percent fee, without requiring the awardee to provide documentation showing that it had successfully sold property at that rate within the previous year, as required by the solicitation.

We sustain the protest.

On June 7, 1991, the agency issued the solicitation, for a fixed-price requirements contract for a 1-year period with a 1-year option, for exclusive real estate brokerage services for single-family dwellings in the Farmers Home Administration inventory. The statement of work called for

the contractor to furnish all labor, materials, equipment, transportation, supervision and supplies, and to perform all work required to list and sell properties in Jackson County, Mississippi.

The instructions to offerors directed preparation of proposals in two parts--a technical proposal and a price proposal; the technical proposal was to include information on the offeror's technical approach, a detailed work plan, information on organization, staff and management, a list of proposed personnel with resumes, the organization's background and experience, and a discussion of present and proposed facilities and equipment. Technical criteria included experience and qualifications (40 points), marketing plan (30 points), availability of broker/agents (20 percent), and office facilities (10 percent).

The information on cost evaluation indicated that the agency would apply the offerors' proposed prices/rates, essentially a commission rate or percentage, to estimated quantities contained in the schedule; since the schedule only listed houses (45 homes) with an average value of \$35,000, this language established that the proposed fee--a percentage of the sale price--would determine the lowest cost for purposes of award. The solicitation provided for award to the offeror whose "technical/cost relationship is the most advantageous to the government," and advised offerors that while cost was secondary to technical factors, it would be a factor in award.

Below the space to insert the commission rate proposed, the schedule contained language which advised potential offerors that ". . . any broker who submits an offer with a commission rate lower than the typical rate for such services in the area must provide documentation that they have successfully sold properties at the lower rate with no compromises in services." The schedule further referred offerors to clause K.19 (actually K.21) of the solicitation, Documentation of Discount Commissions, which advised offerors that if they proposed "a commission rate that is less than the prevailing," they should provide for each such sale the following: date of sale, number of days on the market, commission received, client name and phone number, and the selling agent's name and phone number. The clause required that any such sale must have been within 1 year prior to the issuance of the solicitation and must have been within the geographical area covered by the RFP. The clause defined the "commission received" as the total combined percentage received by both the listing and the selling agency and provided that the offeror must have received the commission for the "date" (presumably "sale") of a single-family detached dwelling. The clause included a form for providing the required information.

The agency received four offers on July 8, all of which it found to be technically acceptable. The three lowest-priced offerors received the three highest technical scores, and these scores were roughly equal--ranging from 91 to 100 points. One offeror proposed a 4.75-percent commission; the protester, proposing a 5-percent commission rate, provided a list of properties for which it had received a 5-percent commission.<sup>1</sup> The eventual awardee, Wayne Martin & Associates Realty, Inc., also proposed a 5-percent commission; Martin did not provide the evidence required by clause K.21, but provided a statement in the space provided in the clause as follows:

"5% commission for a builder is not a discounted rate, but the norm and since there is 35 homes estimated to be available, it is treated as a builder and the same services are given, open houses, daily advertisement and etc. Commission paid to other Realtors is 3% to 4% depending upon the builder. I do not consider 5% a discount rate."

By letters dated August 2, the agency advised the offerors of the areas of their proposals where it had detected weakness. It advised both Pasco and Martin that their proposed commissions were "in line with our estimate" but asked both to review their prices and determine whether they needed to make any adjustments. The agency advised the low initial offeror that its 4.75-percent commission rate "is below our estimate." Upon receiving the August 2 letter, the protester spoke with the contracting officer about lowering its proposed rate; the contracting officer advised the protester that it would have to submit proof, in accordance with clause K.21, that it had sold properties at the lower figure.

The agency received a best and final offer (BAFO) from each of the offerors on August 19. Neither the initially low offeror nor the protester changed its proposal; Martin reduced its proposed rate from 5 percent to 4.5 percent, but provided no information regarding any previous sales at that rate. The fourth lowest-rated offeror lowered its proposed rate to 5 percent.

The agency's evaluation committee reviewed the BAFOs; it advised the contracting officer "that 6 percent (6%) is the normal rate of commission for Jackson County" but that all

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<sup>1</sup>The agency has not provided our Office with a copy of proposals other than those of the awardee and the protester, and the record does not show how the low initial offeror addressed clause K.21.

four offerors had proposed a lower rate. The committee also found that the Martin and Pasco proposals differed significantly only in price, and recommended award to Martin because Martin's proposed rate of 4.5 percent was lower. Based on the receipt of the four offers, two at 5 percent (including Pasco) and two others at 4.5 (Martin) and 4.75 percent, the contracting officer determined "that the market in Jackson County will support a discounted rate," concluded that Martin could sell houses at a discounted rate of 4.5 percent, and awarded the contract to Martin on September 5. After Pasco received notice of award, the firm protested to our Office on September 17. Although not required to do so because the protest was filed more than 10 calendar days after award, the agency executed a best-interests determination to support continued performance of the contract pursuant to 31 U.S.C. § 3553(d) (1988). Pasco asserts that the award on the basis of Martin's low rate, without requiring documentation that Martin has sold properties at that rate, violates the solicitation.

The agency argues that clause K.21 serves to assist the agency in determining an offeror's responsibility; the contracting officer contends that he has determined that the awardee can sell houses at the discounted rate, based on the offers received in response to the solicitation. The contracting officer states that he acted in good faith and believes that there were no irregularities in the evaluation and award process.

The solicitation does not make it clear whether the K.21 information was intended to support a responsibility determination, as the agency contends, or to be considered in the cost evaluation, as the protester asserts. Clause K.21 is located in the representations and certifications section of the solicitation, not in section L under cost proposal preparation information, or in section M under evaluation criteria. Further, the clause requests information to insure that the commission rate is sufficient to provide "for potential success in selling the FmHA inventory in the competitive commercial marketplace," that is, without compromising services. Thus, the information appears to address an agency concern that a firm will buy in at a low commission rate which will affect the ability to market the inventory. This concern is traditionally one of responsibility, that is, whether a firm which submits a below-cost offer can perform at the price proposed. See, e.g., Diemaster Tool, Inc., B-238877, Apr. 5, 1990, 90-1 CPD ¶ 375.

On the other hand, the schedule statement advising offerors that "the rate of commission will be one of the evaluation criteria" and warning that any broker submitting a discounted rate would have to submit documentation proving

that it had successfully sold properties at the lower rate can be read as indicating that the agency would evaluate rates proposed to determine whether an offeror could successfully market properties at the discounted rate, that is, for realism and reasonableness, and required the specified documentation to do so. In either case, however, the agency could not disregard the requirement in awarding the contract.

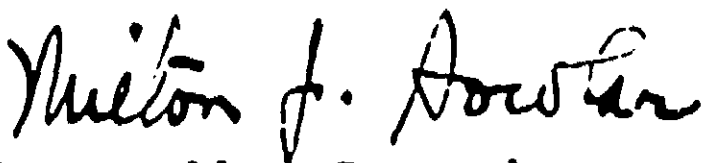
It is a fundamental principle of competitive procurement that offerors be provided with a common basis for the submission and evaluation of proposals. E. C. Campbell, Inc., B-222197, June 19, 1986, 86-1 CPD ¶ 565. Award therefore must be based on the requirements contained in the solicitation, and where the solicitation requires prospective contractors to furnish specific information bearing on their ability to perform the work as a prerequisite to an award, an agency does not have discretion to disregard an offeror's failure to satisfy such a requirement. See United Materials, Inc., B-243669, Aug. 16, 1991, 91-2 CPD ¶ 161. Where the agency determines, however, that the ground rules of a solicitation no longer reflect its needs and can be relaxed, it should amend the RFP and afford all eligible offerors the opportunity to revise their proposals accordingly, particularly where the failure to adhere to those ground rules would prejudice one or more offerors. DynaLantic Corp., 68 Comp. Gen. 413 (1989), 89-1 CPD ¶ 421.

The record shows that the agency accepted Martin's offer of a 4.5 percent discounted rate which was not supported by the required documentation and which the record shows is neither the prevailing rate nor a rate typical for sale of single-family dwellings in the geographical area covered by the solicitation. By accepting Martin's offer without the required evidence of prior sales at the rate proposed, the agency relaxed a material requirement of the RFP. Moreover, the record shows that Pasco and other offerors were prejudiced by the relaxation of the requirement. Not only did the RFP language notify offerors of the documentation requirement, but Pasco was specifically advised during discussions that it could not discount its rate absent the required documentation. Thus, it appears that Pasco and possibly other offerors did not lower their rates because they could not furnish documentation of sales at a lower rate. Under these circumstances, the award to Martin on the basis of its lower rate was both inconsistent with the RFP and prejudicial to Pasco. We therefore sustain the protest.

The record shows that few homes have been placed on the market under this contract. We are recommending to the Secretary of Agriculture that if the agency believes it can obtain an acceptable level of service at less than the

prevailing commission rate in the area without documentation of prior sales at the offered discount rates, it amend the RFP to allow for the submission of offers on such a basis, and that the offerors be afforded an opportunity to submit revised proposals. If the agency does not then conclude that the awardee's proposal is still "most advantageous to the Government," its contract should be terminated for the convenience of the government. In the alternative, if the agency believes the documentation requirement is necessary, it should terminate the contract and make the award to the low, technically acceptable offeror which has furnished the required documentation to support its rate. In any event, the protester is entitled to recover its costs of filing and pursuing this protest. 4 C.F.R. § 21.6(d)(1) (1991). Pasco should submit its detailed and certified claim for such costs to the agency within 60 days of receipt of this decision. 56 Fed. Reg. 3759 (1991) (to be codified at 4 C.F.R. § 21.6(f)(1)).

We sustain the protest.

  
Acting Comptroller General  
of the United States